No. 88-1905

In The

Supreme Court of the United States

October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

Petitioners,

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

Respondents.

On Writ Of Certiorari To The California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TRAYTON L. LATHROP IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF TRAYTON L. LATHROP IN SUPPORT OF PETITIONERS

TO: THE HONORABLE SUPREME COURT OF THE UNITED STATES

Trayton L. Lathrop, a member of the bar of the Supreme Court of the United States respectfully moves the Court for leave to file his brief *amicus curiae* which is attached hereto.

Consent to file a brief *amicus curiae* was requested of the petitioners and respondents by a letter dated October 13, 1989, a copy of which is on file with the clerk of court. The petitioners gave their

consent by a letter dated October 16, 1989, a copy of which is also on file with the clerk of court, but the respondents have not.

The movant is a member of the bar of the Supreme Court of Wisconsin and was the appellant in *Lathrop v. Donohue*, 367 U.S. 820 (1961), which has a bearing on this case. The interest of the movant is amplified in the attached brief.

The movant believes that the arguments presented in his brief may approach the issues differently than the arguments of the parties and that the brief will be helpful to the Court. The movant respectfully submits that it would be helpful and appropriate for the Court to look at the prospect, posed by the decision below, of converting the entire society into compulsory corporate organizations and also look at how this Court has abandoned the basis for its decision not to rule on the free speech question in *Lathrop v. Donohue*.

WHEREFORE, the movant prays that leave to file the attached brief *amicus curiae* be granted.

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INTEREST OF AMICUS CURIAE

This brief is submitted in support of the petitioners in the above matter in their effort to secure a reversal of the decision of the California Supreme Court in *Keller v. The State Bar of California*, 47 Cal. 3d 1152, 767 P.2d 1020 (1989).

The undersigned has been licensed in the active practice of the law in the State of Wisconsin since February, 1948 and was admitted to practice before the Supreme Court of the United States on January

16, 1961. He is the senior active partner in a law firm comprising 29 lawyers at Madison, Wisconsin. He was the appellant, appearing *pro se*, in *Lathrop v. Donohue*, 367 U.S. 820 (1961) and is a member of the American Bar Association, the Bar Association of the Seventh Federal Circuit, the Federal Bar Association, the Wisconsin Intellectual Property Law Association and the Dane County Bar Association. He is a dues paying member of the State Bar of Wisconsin which was involved in *Lathrop v. Donohue*, *supra*, as a compulsory association, and has operated under orders of the Wisconsin Supreme Court as a voluntary association after the decision in *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988), reversed, *Levine v. Heffernan*, 864 F.2d 457 (7 Cir. 1988), *cert. den.*, October 3, 1989. He is the author of *The Racial Covenant Cases*, 1948 Wis. L. Rev. 508 (1948) and *The Fourteenth Amendment's Effect Upon State Laws Governing the Use of Land: A Comment on Evans v. Abney*, 55 Marq. L. Rev. 511 (1972). He was the principal counsel for the successful appellants in *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) and *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

The undersigned was one of five Wisconsin lawyers who conducted a poll in 1979 of the 9,319 active members of the State Bar of Wisconsin on the question "Do you favor the continuation of the State Bar of Wisconsin as an integrated bar?" The results of the poll were reported to the Wisconsin Supreme Court as follows: "1,892 affirmative and 2,820 negative." See *Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 386, 286 N.W.2d 601 (1980). The poll was taken after the Supreme Court of Wisconsin by a divided decision denied a petition by over 400 members of the State Bar of Wisconsin to have a poll taken on a similar question. *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979).

SUMMARY OF ARGUMENT

An association of attorneys is as much an ideological organization as any other. It is an "interested" organization. It cannot be converted into a disinterested organization by labeling it as governmental or public. It is an interference with personal liberty and equal protection contrary to the Fourteenth Amendment to vest governmental power in such an association. The Wisconsin Supreme Court has recognized the impropriety by removing from the State Bar of Wisconsin functions pertaining to discipline and supervision of the education of lawyers.

The basis of the plurality's decision not to reach the free speech

doned by this Court. It is no longer necessary that a person identify any particular issue that he opposes in declining to support an organization. In several decisions starting with *Elrod v. Burns*, 427 U.S. 347 (1976) this Court has held that forced support of interested organizations or ideologies except to the extent required by a compelling state interest violates the Fourteenth Amendment.

One speaks with his resources, whether they be time, talents or money. The state has no right to compel the use of those resources in the marketplace of ideas.

ARGUMENT

I. IT IS AN INTERFERENCE WITH PERSONAL LIBERTY AND EQUAL PROTECTION RIGHTS TO COMPEL SUPPORT OF THE STATE BAR OF CALIFORNIA

Each of the two questions for which this Court granted certiorari pertain to compelled financial support of an association of lawyers which "engages in" or uses the funds "to promote" "political and ideological activities."

We submit, first, that an association of attorneys such as the State Bar of California is an ideological association. If a compulsory association of physicians supports a bar association, an objecting physician could rightfully object to the compelled use of his funds for ideological activities.

One person's ideology often is another's firm foundation. Any association may be one man's anathema and another's joy. It is the association itself that often is perceived to embody the cause.

Part of the issue then is whether an association, the membership of which is limited to those engaged in a particular occupation or field of endeavor, is an ideological association for those persons so engaged. The answer to that question can only be answered "yes", we submit. Otherwise, it must be assumed that all persons in a given occupation have identical opinions and desires as to the goals of the association.

Another part of the issue is whether ideas may be boxed in by the government by giving an association organized along occupational lines a governmental function in addition to its usual associational activities. There are at least two answers to that question, we submit. The first is that the government should not be able to use an indirect means to regulate ideas. The second is that the government should not be able to delegate governmental power to private, interested groups which are not responsible to the citizens of the area in which the power is to be exercised. We submit that such delegation clearly offends the "one person, one vote" ruling of *Reynolds v. Sims*, 377 U.S. 533 (1964). We submit that such delegation offends "the funda-

mental principles of liberty and justice which lie at the base of all of our civil and political institutions, the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure" referred to in *Hurtado v. California*, 110 U.S. 516, 535 (1884). Delegation "not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others * * * [is] an intolerable and unconstitutional interference with personal liberty. . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

There exists a matter of definition. If an association is regarded as "interested" rather than "disinterested", we submit that it is "private" dispite the labels placed on it. If it is interested or, in other words, private, the association is ideological; and, we submit, support of the organization may not be compelled, unless there is some overriding, compelling state interest which this Court deems to be controlling. Then it is only to the extent of that overriding interest that the liberty of the citizens to select their own governors and the liberty of free expression may be suppressed, if at all. We submit that an organization formed along occupational lines, such as the State Bar of California, not embracing all citizens in a particular area, is necessarily interested.

The Wisconsin Supreme Court has recognized the impropriety of delegating governmental power to an association organized along occupational lines by establishing disinterested agencies directly under the control of the Supreme Court for the education and discipline of lawyers. See 71 Wis. 2d xix (1975), 73 Wis. 2d xxi (1976), 74 Wis. 2d ix (1977) and *Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 386-387, 286 N.W.2d 601, 602 (1980).

Contrary to Wisconsin, the State of California by action of its legislature still vests in a bar association the examination and discipline of lawyers. And it provides for the government of the association by a board of 22 members, 15 of whom are elected by lawyers in geographical regions, one of whom is elected by the directors of the California Young Lawyers Association and six are appointed by the Governor of the state. The officers are elected by the board. There is also a conference of delegates consisting of representatives of various local and special bar associations and committees and sections. The association lobbies the legislature and files amicus curiae briefs. *Keller v. The State Bar of California, supra*, 767 P.2d at 1024-1025. Because California law treats the association as a governmental agency, the California Supreme Court, by a majority of its members, sanctions compulsory financial support of the association. *Id.* 767 P.2d at 1033.

The rationale of the California decision would apply to any delegation of governmental power to any association organized along private occupational or business lines.

The decision of the California Supreme Court if left standing, we submit, would open up to each state the authority to organize itself in the manner that John R. Commons, the noted professor of economics at the University of Wisconsin, observed in Italy six decades ago. He said ". . .In order to carry on business or get a job each individual is compelled to become a member or at least pay dues to his syndicate. . . . It is these compulsory corporations that have taken the place of parliament. They are both political and economic. . . ." Commons, John R., *Institutional Economics* p. 883 (1934).

If the states may, one by one, adopt such a compulsory corporate way of governing society, we respectfully submit that the federalism forged in the crucible of the Civil War and sharpened and finely tuned by more than a century of the decisions of this Court will break apart.

Citizens cannot have a right of suffrage as to particular matters if the governmental power with respect thereto is delegated to interested associations. When that happens the voting power of each member of the association may be hundreds or thousands of times the voting power of the ordinary citizen. As stated in *Reynolds v. Sims, supra*, the right of suffrage which "is of the essence of a democratic society" "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. at 555.

Wisconsin's Acting Governor Walter S. Goodland, in his message vetoing Wisconsin's Senate Bill 56 S (1943) (which is quoted at length at pages 40a to 42a of the jurisdictional statement in *Lathrop v. Donohue*, Case No. 200, United States Supreme Court October Term, 1960) stated:

> The proposal of compulsory membership in any organization is contrary to Wisconsin legislative tradition. It is opposed to our conception of democracy and individual initiative. . . .
>
> * * *
>
> . . .I am convinced that the people of this state believe in the honored tradition and principle of self-determination. This bill forbids that. It is a step further toward regimentation of the people.
>
> * * *
>
> From its very inception, the legal profession has been recognized as semi-public servants of the people. It is the first line of defense in the guarding and protection of human

rights and liberties. Its training in and knowledge of the laws and constitution and the details and operation of government, pre-eminently qualify it as the protector and defender of human rights. It should be constantly onguard to oppose, at its very inception, the slightest attempt to encroach on the fundamental of human rights and liberties. In this instance that duty seems to have been forgotten or ignored, — for what reason, it is not my province to determine.

The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of bill No. 56, S, with its denials of individual freedom of action. If this were eliminated, I would very gladly sign it.

The issues, then, are basically issues going to the very basis of democracy, issues which *Reynolds v. Sims* recognizes as fundamental under the Fourteenth Amendment.

II. THE BASIS OF THE PLURALITY'S DECISION TO NOT DECIDE THE FIRST AMENDMENT ISSUE IN *LATHROP v. DONOHUE* HAS BEEN ABANDONED BY THIS COURT. FORCED SUPPORT OF INTERESTED ASSOCIATIONS OR IDEOLOGIES IS NOT PERMITTED IN THE ABSENCE OF A COMPELLING STATE INTEREST, IF ANY

The California Supreme Court, after reviewing *Lathrop v. Donohue*, 367 U.S. 820 (1961), stated that "the treatment of bar dues remains an unsettled question." 767 P.2d at 1025. We submit that the question is not unsettled in view of later decisions of this Court which require a result contrary to that of the California court below.

In *Lathrop v. Donohue*, the Court assumed that, to show a wrong, the appellant had to specify any causes that he opposed, saying:

> Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position. . . . 367 U.S. at 845-46.
>
> [T]here is no indication . . . of appellant's views on particular proposals. . . . 367 U.S. at 846.
>
> [T]here is no indication in the record as to . . . how much has been expended for political causes to which appellant objects. . . *Id.*
>
> [O]n oral argument here appellant disclaimed any necessity to show that he had opposed the position of the State Bar on any particular issue and asserted that it was sufficient that he opposed the use of his money for any political purposes at all. In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below. . . . *Id.* at 847.

In his Petition for Rehearing or Other Relief, in *Lathrop v. Donohue*, the appellant stated "that he should be able to refuse to support a church he believes in without penalty from the state" p. 5 and that

> *A governmental requirement that an individual belong to or financially support an association unless he swears that he does not believe in some of the policies of the association coerces the individual to reveal his beliefs — a violation of the freedom of speech and other liberty guarantees of the Fourteenth Amendment.* It is appellant's position that the guarantees of liberty and of free speech are violated even when he is forced to support ideas which he may *approve of* invarying degrees. (p. 3, emphasis in the original.)

Within two years after *Lathrop v. Donohue* this Court in *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963) held that ". . .it is enough that he manifests his opposition to any political expenditures by the union." (Emphasis in the original.) But the Court distinguished the *Lathrop v. Donohue* holding because it "was made in the context of *constitutional* adjudication, not statutory as here." *Id.* note 5 at 118, emphasis in the original. The Court came full circle in the constitutional case of *Abood v. Detroit Board of Education*, 431 U.S. 209, 240-241 (1977) saying "[a]lthough *Street* and *Allen* were concerned with statutory rather than constitutional violations, that difference surely could not justify any lesser relief in this case" and that:

> As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any sort* that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. (Emphasisin the original.)

Thus, the reason for not reaching a decision in *Lathrop v. Donohue* has been abandoned.

Since *Lathrop v. Donohue*, this Court has made several significant decisions holding unconstitutional forced support of ideologies. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood v. Detroit Board of Education*, *supra*; *Pacific Gas and Electric Company v. Public Util-*

ities Commission of California, 475 U.S. 1 (1986) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). These decisions, we submit, are manifestations of the *Reynolds v. Sims* holding that the Fourteenth Amendment guarantees "the essence of a democratic society." 377 U.S. at 555. These decisions reiterate the quotation made by this Court over a century ago from the Virginia statute establishing religious freedom, drafted by Thomas Jefferson, that " to suffer the civil magistrate to intrude his powers in the field of opinion . . . is a dangerous fallacy. . . ." *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

One speaks with his resources. Even speaking on a street corner uses the resource of time. More often the resouces are talents and money. The First Amendment concern is succinctly set forth in the plurality opinion of *Pacific Gas & Elec., supra*, 475 U.S. at 11 as follows:

> As we stated last Term: "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (Emphasis in the original.)

We submit that compelled support of "interested" associations cannot stand up against the First and Fourteenth Amendments. And we submit that any association organized along occupational lines is "interested."

It has been nearly 30 years since the question of compelled support of an association of lawyers has been before this Court. We respectfully submit that the issue, then as now, is much greater than an issue regarding lawyers. It is an issue of whether the First and Fourteenth Amendments permit this nation, state by state, to undertake a compelled corporate style government which would be boxed in not according to geographical regions but according to occupations and professions and businesses.

We submit that the Court should determine that forced support of the California State Bar contravenes the Fourteenth Amendment.

III. CONCLUSION

Associations of lawyers, as is the case with any other occupational group, are "interested" not disinterested. Their avowed interest may be to secure the very best for society. That is what is assumed to be the interest of a legislature every time it acts. But a legislature, if properly constituted, represents the whole people. An association of lawyers does not. And even the legislature should not use funds raised by the force of law to engage in the marketplace of ideas.

"Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

An occupational association represents at best those in the occupation or a portion thereof. The doctrine of *Reynolds v. Sims* is violated every time governmental power is delegated to an interested association. And it is violated when people are forced to financially support the whole or any part of the activities of the association. We submit the decision below should be reversed.

Respectfully submitted,

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November, 1989